U.S. Department of Labor
Office of Administrative Law Judges
Heritage Plaza Bldg, 5th Floor
111 Veteran's Memorial Boulevard
Metairie, LA 70005

Case No. 97-ERA-13
Date Issued: January 23, 1998

In the Matter of:

Dr. SAMUEL A. AGBE
Complainant

v.

TEXAS SOUTHERN UNIVERSITY
Respondent

APPEARANCES:

MONA LYONS, ESQ.
For The Complainant

CHERYL N. ELLIOT, ESQ.
For The Respondent

Before: LEE J. ROMERO, JR.
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises under the employee protection provision of the Energy Reorganization Act (herein the Act), 42 U.S.C. § 5851 and the pertinent regulations at 29

C.F.R. Part 24. On August 13, 1996, Dr. Samuel A. Agbe (Complainant) filed an administrative complaint against Texas Southern University (Respondent) with the Wage and Hour Division of the United States Department of Labor (DOL). The complaint was initially filed against Respondent pursuant to the Energy Reorganization Act, the Toxic Substance Control Act (15 U.S.C. § 2622), the Water Pollution Control Act (33 U.S.C. § 1367), the Clean Air Act (42 U.S.C. § 7622), and the Solid Waste Disposal Act (42 U.S.C. § 6971). (ALJX-3). An initial investigation by the DOL Wage and Hour Division found that Respondent withdrew an employment offer to Complainant because of his protected activity. Respondent filed a timely appeal.

This matter was referred to the Office of Administrative Law Judges for a formal hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing in Houston, Texas, which commenced on August 18, 1997 and closed on August 19, 1997. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. The following exhibits were received into evidence: [1]

Complainant Exhibit numbers: 1-5, 6A, 6B, 7-18, 21, 24, 27
Respondent Exhibit numbers: B, D, G-K, M-R
Administrative Law Judge Exhibit numbers: 1-5

Proposed findings of facts and conclusions of law were received along with briefs from Complainant and Respondent on October 31, 1997. Based upon the evidence introduced and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Recommended Order.

I. ISSUES

1. Complainant's Employment Status and Protected Activity.
2. Respondent's alleged discriminatory conduct.

II. SUMMARY OF THE EVIDENCE

Testimonial Evidence

Complainant

Complainant is married and has three children. He has a bachelor of science degree in physiology and biochemistry. In addition, Complainant earned a master's degree in general

---

biochemistry at Chelsea College and a doctorate degree in biochemistry at St. George's Hospital Medical School at the University of London. (Tr. 233-234; CX-3). Complainant worked at the University of Texas Medical Branch (UTMB) from January 1988 until August 1995 in the Department of Pharmacology and Toxicology as a Research Associate II. (Tr. 236). He explained that his job position ended when his supervisor and the grant project ended. (Tr. 314). While working at UTMB, Complainant received

formal training for the use of radioactive material in university labs. (Tr. 251). Complainant worked with radioactive material such as iodine-125 and tritium while he worked on the tryanosomiasis project. (Tr. 344; CX-3). In addition, he worked with radioactive material while he was at the University of London. (Tr. 414). While in London for a total of fourteen years, Complainant was responsible for supervising the academic teachings of Gross and Micro Anatomy lecture classes, performed post-graduate work with trypanosome membranes, was the senior research medical laboratory scientific officer in histopathology of body tissues and in tumor histopathology. (CX-3).

Prior to working at UTMB, Complainant worked at the University of Ife, Nigeria. Throughout the years, he supervised and conducted numerous projects and programs for the Health Sciences. (CX-3).

In March 1996, Complainant was hired by Dr. Barbara Hayes, associate professor of pharmacology, to work at Respondent's institution as a temporary research associate. (Tr. 236). Complainant's responsibilities consisted of writing assignments concerning the technology being introduced at Respondent's institution and the development of the academic conditions. (Tr. 237).

On April 9, 1996, Dr. Hayes assigned Complainant to work for Dr. Shirlette Milton, assistant professor in Respondent's College of Pharmacy and Health Sciences. After Complainant familiarized himself with Dr. Milton's research project, Dr. Milton instructed Complainant to work in laboratory 201 (herein the lab). Complainant informed Dr. Milton he could not work in the lab because as a temporary research associate he did not have medical insurance. (Tr. 237-238). After Complainant spoke with Dr. Milton and Dr. Hayes concerning his inability to work in the lab because of his lack of medical insurance, Dr. Hayes instructed Complainant not to perform work in the lab but continue assisting Dr. Milton outside of the lab in the same manner. (Tr. 238). Complainant was further instructed by Dr. Hayes not "to do any of that job which medical insurance might be involved." (Tr. 238, ln. 23).

Dr. Milton instructed Complainant to perform cell proliferation studies using tetrazolium salt, place orders for iodine-125 [2] and tritium, "do biddings for microplate readers and eight channel micropipette," conduct a literature search for information regarding her project, observe the removal of iotick cells from rats, prepare culture reagents, and store stabitates. (Tr. 316-317).

Complainant testified that on May 17, 1996, Dr. Milton informed him he would be selected for the permanent research associate position, which included receiving medical benefits, if he wanted it and that he had plenty of time to consider taking the job position. He

explained that he recalled this date because it occurred when he went to watch another assistant perform a surgical operation on a rat. Because Complainant believed he was going to be hired as a permanent employee and receive medical insurance, he agreed to work in the lab. (Tr. 239).

On this same day, Dr. Milton took Complainant into the lab to show him the facility. Upon entering the lab, Complainant placed his materials on the center island table. Complainant testified that Dr. Milton yelled at him to remove his materials because radiation studies had been performed on the table. Dr. Milton showed Complainant the lab and the equipment, including the fume hood where radioactive material was stored and the refrigerator which contained cultures. Dr. Milton showed him some boxes that were in a cupboard underneath the fume hood which contained test tubes holding "just waste" according to Dr. Milton. After Complainant informed Dr. Milton that the waste should be removed, Dr. Milton informed him that Respondent did not have "waste removal." (Tr. 240-241).

Complainant told Dr. Milton that during his previous experience working with radioactivity, waste was always removed and not stored in the fume hood. (Tr. 241). Dr. Milton told Complainant not to worry about the waste because swab tests were performed regularly in the lab. (Tr. 242; See RX-N).

After Dr. Milton left the lab, Complainant began to perform preliminary steps for conducting future radiation studies. He determined that the hood was not circulating air into the atmosphere but recirculating air into the room. He borrowed a crude instrument to test the hood for proper air circulation which "didn't read good." (Tr. 242).

Complainant testified that on May 17, 1996, he first informed Dr. Milton of his concerns with the radioactive material stored and used in the lab. Based on the preliminary tests he performed earlier in the day, Complainant informed Dr. Milton that the hood was not a grade A hood which was necessary when using radioactive material. Complainant suggested to Dr. Milton that the hood be upgraded. Complainant again informed Dr. Milton that in his prior experience, the radioactive waste was disposed of regularly because of the potential safety problems. (Tr. 247). According to Complainant, Dr. Milton told him that she would consider his concerns and make any necessary adjustments in the lab. (Tr. 248). Complainant testified that he believed his concerns for the conditions in the lab posed a potential safety hazard for people using the lab. (Tr. 251).

After Complainant's first visit to the lab in mid-May, he began to regularly work with Dr. Milton on her research projects. (Tr. 242). From May 1996 until the end of June 1996, Complainant ordered numerous lab supplies, which included iodine-125, tritium, and Phosphorus-32, all radioactive materials. In addition, Complainant conducted experiments in the lab that did not involve radioactive material. He worked on other activities in his office, which was a separate room from the lab. (Tr. 245-246). In early June 1996, Complainant had submitted his application to Dr. Milton for the research associate job position. (Tr. 253).

In June 1996, Complainant wanted to prepare the lab for the use of iodine-125 in future experiments. (Tr. 257). Complainant testified that he attempted to obtain the protocol for

---

using iodine-125 from Mr. M. Spivey, Jr., Respondent's radiation safety officer, however, Mr. Spivey was never at the university, nor did he respond to Complainant's messages. [3] Because Complainant believed the lab conditions were unsafe to handle iodine-125, he contacted UTMB for instructional help for the safe use of iodine-125. [4] (Tr. 257-261).

In mid-June, Complainant again raised his concerns on a second occasion to Dr. Milton after viewing some material incorrectly stored in another laboratory. Complainant testified that he asked Dr. Milton to insure that all of the radioactive material in all of the labs be stored properly and the waste removed. (Tr. 252-253).

Complainant explained that he and Dr. Milton had discussions from time to time about his safety concerns for the conditions in the lab. He continued to believe she was going to correct these problems since she had let him fix the autoclave in the lab after he continued to remind her that it could work more efficiently. (Tr. 254-255).

Complainant testified that at the end of June 1996, Dr. Milton informed him that she formally selected him for the job position of research associate. [5] (Tr. 262). In addition, Dr. Milton informed Complainant that he would receive $2,611.50 per month, the start date was July 1, 1996, and orientation would be held on July 8, 1996. (Tr. 262; CX-4A). On July 8, 1996, before Complainant attended the orientation, he viewed a document that contained his name and the salary listed for the research associate job position was $2,591.67 per month which was not the salary discussed with Dr. Milton. Complainant became very distraught because of the discrepancy. He scheduled an appointment with Dr. Milton to discuss this discrepancy. Complainant testified that he asked Dr. Milton if "this [is] how you treat your employees? You told me one thing, and you didn't do it. Now you gave me a different salary." Complainant further testified that Dr. Milton apologized for the discrepancy and said it would be corrected. Because of the discrepancy, Complainant did not attend the orientation. (Tr. 266).

On this same day, Complainant was given a corrected personnel form which listed the salary as $2,611.50 per month for the research associate position. (Tr. 266). Complainant thanked Dr. Milton for correcting the salary and then continued with his work. (Tr. 267). Complainant did not speak with Dr. Milton about the job position nor the lab safety conditions for the remainder of the day. (Tr. 269). Sometime in the afternoon on July 8, 1996, after the salary discrepancy was corrected, Dr. Milton praised Complainant for his work. He explained that Dr. Milton came to lab and praised him because the cell proliferation he conducted was producing results. (Tr. 270).

Complainant testified that on July 8, 1996, he did not inform Dr. Milton that he required time to reconsider the job position. (Tr. 268). Complainant explained that he was "happy" to be offered a permanent job position. (Tr. 310).

On July 10, 1996, Complainant and Dr. Milton spent several hours together

---

in the library conducting research. According to Complainant, he and Dr. Milton engaged in friendly conversation the entire time they were together. They did not discuss the research associate job position. (Tr. 272). He further testified that Dr. Milton did not inform him that she had placed his appointment on hold. (Tr. 268).

On July 11, 1996, Complainant notified Dr. Milton that she had not addressed all of his complaints concerning the conditions in the lab. Complainant explained that he confronted Dr. Milton at this time since she was leaving for two weeks and he wanted the lab conditions remedied. (Tr. 272). In addition, he was concerned that the iodine-125 he ordered in the past would arrive while she was away. (Tr. 308). Complainant asked to use Dr. Milton's Geiger counter to show her that there were measured amounts of radioactivity from the fume hood, the cupboard, and the refrigerator. Complainant testified that the Geiger counter made loud clattering noises around these objects which indicated the presence of radioactive substances. According to Complainant, Dr. Milton told him that she understood his concern and that all the conditions would be remedied upon her return on July 29, 1996. Complainant testified that Dr. Milton remained calm throughout the heated discussion. (Tr. 272-273, 290). During the discussion, Complainant informed Dr. Milton that he had contacted the Texas Department of Health, Radiation Department informing the office that Dr. Milton was not operating a safe lab. Moreover, he told Dr. Milton that the lab would be inspected. (Tr. 290).

On July 12, 1996 Complainant was conducting the work assigned to him by Dr. Milton when she informed him that she could not work with him because he gave her "heartache and headache" with all of his concerns. (Tr. 274). Dr. Milton told Complainant that he repeatedly told her about the same concerns and that she was "ready to set fire . . . to all the work we've done together . . ." (Tr. 274, ln. 19). Dr. Milton instructed Complainant to pack his books and leave the lab and not enter it while she was away. (Tr. 275, 318, 351). Complainant explained that he was very upset upon learning that the offer of employment was withdrawn. (Tr. 274).

Complainant explained that he continued to work for Respondent from July 12 through July 31, 1996 performing "general typing of [sic] what Dr. Hayes asked me to do." (Tr. 319, ln. 14). He did not perform any work for Dr. Milton after July 12, 1996. (Tr. 319).

On July 22, 1996, Complainant sent a letter to Dr. Milton asking for written verification that the research associate position was being eliminated. (Tr. 282; CX-11). In addition, Complainant requested that Dr. Milton continue to investigate the safety concerns he

mentioned to her in the past. (CX-11). According to Complainant, this was the first time he had provided written notification to Respondent of his concerns about the conditions in the lab. (Tr. 304). On this same day, Complainant received a memorandum from Dr. Hayes as a reminder that his temporary appointment would end on July 31, 1996. (CX-12).

On July 23, 1996, Complainant wrote a letter to the Texas Department of Health, Radiation Department describing the conditions of the lab. In addition, Complainant

---

contacted the same department and spoke with Brad Caskey, radiation control inspector. (Tr. 289; CX-13). On September 24, 1996, a representative of the department conducted an investigation of the lab. The report indicated that the lab was in compliance with pertinent regulations. (RX-I; RX-J). Complainant testified that as of July 11, 1996, radioactive waste was stored in the fume hood, in a cupboard underneath the fume hood, and in the refrigerator unlabeled. The waste in the cupboard was stored in test tubes and other containers which were contained in a cardboard box. (Tr. 397). He further testified that neither the door to the lab nor the refrigerator door were labeled with a cautionary sign indicating radioactive material. There were no cautionary signs located on the work tables where radioactive studies were performed. Lastly, Complainant never saw an operating and safety manual pertaining to radiation safety. (Tr. 398-399).

Complainant testified that he informed Dr. Hayes of his concerns with the conditions in the lab. (Tr. 305). He was unaware whether Dr. Hayes or anyone else conducted an investigation of his concerns. (Tr. 403). As of July 12, 1996, the radioactive waste was not removed. (Tr. 323). On July 29, 1996 he noticed that radiation cautionary signs had been placed on the entrance door to the lab. (Tr. 331, 417).

On August 3, 1996, Complainant submitted a grievance form to Respondent describing the alleged employment discrimination he experienced. (Tr. 295; CX-15). Complainant's grievance was rejected because he was not a full-time regular employee. (Tr. 299; CX-18). On August 8, 1996, Complainant submitted his complaint against Respondent to the Department of Labor. (Tr. 297; CX-16).

Although Complainant actively sought employment from July 31, 1996, Complainant was unable to obtain full-time employment until August 13, 1997. (Tr. 231; 301). He occasionally worked part-time at the Brazosport College teaching emergency medical sciences. Complainant taught evening courses on an "as needed basis." He earned a total of $900.00. (Tr. 232).

In July 1997, Complainant obtained an alternate certification for teachers. Complainant testified that he has been employed as a full-time teacher by Ball High School since August 13, 1997. (Tr. 228). He explained that $25,000.00 is his base salary for the job position, however, he believed he would receive a salary of $30,000.00 because he has

two graduate degrees, and based on his experience at UTMB and the University of Ife. (Tr. 229-230).

Katherine Agbe

Katherine Agbe has been married to Complainant for fifteen years. (Tr. 421). Mrs. Agbe testified that she and Complainant worked, in different departments, at the University of Ife for five years. She explained that the departments were within walking distance such that she saw Complainant daily. (Tr. 445). Mrs. Agbe testified that during the time Complainant worked for Respondent, he related his concerns about the safety conditions of the lab. (Tr. 420-421). He mentioned that the radioactive waste was not being disposed of as regularly as it had at UTMB and at the University of London, and the radioactive material was not handled in the manner that he

---

learned at UTMB and at the University of London. In addition, Complainant had mentioned the incident in which he used a Geiger counter in the lab. Mrs. Agbe could not recall the dates when she and Complainant had these discussions. (Tr. 430-432).

Mrs. Agbe testified that Complainant was devastated when he learned he would not be appointed as a research associate for Dr. Milton. She explained that Complainant was very upset and concerned for the well being of their family. (Tr. 424).

According to Mrs. Agbe, Complainant earned $5,800.00 from state employment and $978.00 from Brazosport College for teaching two evenings a week. [6] (Tr. 426-427). In addition, they maintained a life insurance policy after Complainant stopped working for Respondent. The premium was $80.00 per month. (Tr. 436). She testified that Complainant would have contributed $189.00 per month to the Teacher Retirement program [7] if he worked for Respondent. (Tr. 427). Complainant and Mrs. Agbe obtained medical insurance through her employer at a cost of $7,200.00 during the time Complainant did not have full-time employment. [8] (Tr. 443). They incurred $600.00 worth of medical expenses during this time. (Tr. 427).

Shirlette Milton, Ph.D.

Dr. Shirlette Milton received her bachelor of science degree in pharmacy from Texas Southern University. She obtained her masters of science degree in pharmacy chemistry and her doctorate degree in pharmacology from the University of Texas. (CX-27). Dr. Milton has been an assistant professor in the College of Pharmacy and Health Sciences at Respondent's academic institution since 1980. She was the Chair of the Department of Pharmaceutical Sciences from 1995 through 1997. (Tr. 28-31). In addition to her regular teaching and administrative duties as a department chairperson, Dr. Milton conducted research for the Research Centers and Minority Institutions (RCMI), a program operated under a grant received by Respondent from 1994 through August 1997. (Tr. 28-31).

While conducting research under the RCMI grant, Dr. Milton was the director of the Tissue Culture Laboratory and a project investigator for her individual research project. As the director for the Tissue Culture Laboratory, Dr. Milton had authority to hire and terminate employees who performed work under the RCMI grant. (Tr. 31).

In April 1996, at the suggestion of Dr. Hayes, Dr. Milton requested Complainant to assist her with her research. Dr. Milton instructed Complainant to "do the literature and background information to set up an assay to do a non-radioactive proliferation study, and compare it with one that would be radioactive." (Tr. 36, line 25). In addition, Complainant "provided services to help isolate sales [sic] that would be used in the experiments, and he conducted preliminary studies [sic] the non-radioactive assay." (Tr. 37, ln. 14). Lastly, Complainant was instructed to order radioactive materials for use in future experiments. (Tr. 37).

[Page 9]

Dr. Milton testified that at the time Complainant conducted work in the lab, radioactive waste material had been stored in the fume hood behind a lead shield for a minimum of seven months. [9] Moreover, other radioactive material was being stored in the refrigerator and freezer. According to Dr. Milton, the radioactive material stored in the refrigerator and freezer was stored in accordance with the manufacturer's guidelines. (Tr. 38). She explained that the radioactive waste had not been disposed of because the process is expensive, and she was waiting until a "full amount" accumulated before disposing of it. (Tr. 41).

On May 7, 1996, Dr. Milton received notice that five applications were received for the job position of research associate. (Tr. 56-57; CX-4B). On June 7, 1996, Dr. Milton requested that Complainant submit an application for the job position. [10] (Tr. 65-66). Prior to formally selecting Complainant and having her selection approved, Dr. Milton informed Complainant that she "initiated paperwork where [she] recommended him" for the research associate job position and that the salary was $31,338.00 per year. (Tr. 82, 92). Dr. Milton testified that she informed Complainant her selection had to be approved and the start date would be determined at that time although the job advertisement listed July 1, 1996 as the start date. [11] (Tr. 82).

On July 2, 1996, after receiving Complainant's application and reviewing eight other applications, Dr. Milton formally selected Complainant for the job position. (See CX-5). She testified that Complainant was selected because he was the best candidate for the job position based on his educational training and research experience. (Tr. 67-69; CX-8).

Although Dr. Milton was unaware whether her selection of Complainant was approved at the time she informed Complainant of her selection, she instructed him to attend an orientation for new employees on July 8, 1996. (Tr. 82). She explained that if Complainant had not been approved at that time, personnel conducting the orientation would have informed Complainant he could not attend the orientation because his

appointment was not approved. (Tr. 90). According to Dr. Milton, the final approval for her selection of Complainant was never completed. (Tr. 121).

On July 8, 1996, Complainant informed Dr. Milton that the personnel form which showed his appointment to the job position listed a different salary than the salary she quoted to him. After Dr. Milton met with Complainant, she spoke with an administrative assistant who informed her that she did not have the authority to determine the salary for the job position. She was also informed that Complainant would not receive $31,338.00. Dr. Milton informed Complainant of her mistake. At this time, according to Dr. Milton, Complainant informed her that he was unsure whether he wanted the job position since Dr. Milton promised a specific salary and then could not provide it. [12] Dr. Milton told Complainant that she would "get back with him." Dr. Milton convinced Dr. Hayes to approve the $31,338.00 salary for Complainant. [13] According to Dr. Milton, Complainant then told her that he remained unsure whether he wanted the job position since she first said that she could not provide the higher salary and then informed him

---

that he would receive the higher salary. Dr. Milton testified that Complainant appeared not to trust her because she would say one thing, yet do something else. (Tr. 93-95).

Dr. Milton testified that sometime in June 1996 Complainant informed her that he was unsure about accepting the job position because he would lose his semi-private office and instead would have to use space in the lab as his office. (Tr. 109-110, 113). She explained that Complainant was unusually concerned about losing his office space and became enraged when he learned that only directors and faculty members have offices. [14] (Tr. 110).

On the morning of July 9, 1996, Dr. Milton asked Complainant if he made a decision about the job position. According to Dr. Milton, Complainant informed her that he was unsure whether he wanted the job position and that he required some time to make a decision so he could discuss it with his family. Complainant could not provide a date at which time he could tell Dr. Milton of his decision. (Tr. 95). Because Complainant could not provide a decision about the job position, Dr. Milton wrote a memorandum to Alvin Wardlaw, Administrative Assistant for Budget, Academic Affairs, informing him that Complainant's appointment to the research assistant position should be placed on hold because he was reconsidering whether to accept the job position. (Tr. 95; CX-9).

Also on July 9, 1996, May Ngan, RCMI grant administrative assistant, informed Dr. Milton that Complainant commented Dr. Milton didn't know what she was doing in the lab. (Tr. 57, 190-191, 198). Dr. Milton did not consider Complainant's comments a problem upon hearing them, however, when she and Complainant began having other "disputes and confrontations," this became a contributing factor to her decision to withdraw the employment offer. (Tr. 200). Neither Dr. Milton's testimony nor any other

record evidence specifically delineate the "disputes and confrontations" she had with Complainant which occurred after July 9, 1996.

On July 12, 1996, Dr. Milton attempted to discuss with Complainant his decision regarding the job position. She testified that Complainant explained to her that he needed a job, however, he was concerned about working under her supervision because he was unsure whether he could trust her. At that time, Dr. Milton advised Complainant that maybe he should not accept the job position if he felt "half-hearted" about it. She then informed Complainant that she was withdrawing the job offer because she did not think she could work with Complainant if they were going to experience "these kinds of issues." (Tr. 95-96). Dr. Milton informed Ms. Ngan that she was withdrawing the job offer to Complainant. (Tr. 97). According to Dr. Milton, Ms. Ngan informed her that she would take care of the necessary paperwork. (Tr. 97).

Dr. Milton testified that she became concerned in early June 1996 with her selection of Complainant because he became "so enraged over seemingly small things" such as losing office space, however, her concerns were not significant enough to keep her from selecting him for the job position. (Tr. 127-128, 185-187). She testified that Complainant's anger frightened her. (Tr. 162). She was satisfied with Complainant's overall job performance,

---

professionalism, and his demeanor. (Tr. 97-98, 185, 187). She later testified that she was satisfied with Complainant's job performance, demeanor, and professionalism until July 8, 1996. (Tr. 185-188). According to Dr. Milton, once Complainant believed he was hired and she "really needed someone," his attitude changed such that Complainant did not readily accept her instructions, although he would eventually conduct the work as instructed. [15] She further explained that Complainant wanted to advise her of the methods to use for certain tasks since he had experience performing those tasks. (Tr. 165, 168).

Other than the incident concerning office space, Dr. Milton testified that Complainant appeared subdued, however, she testified that she felt he was unpredictable. She explained that Complainant raised the office issue with her on many occasions and was "very unprofessional in his handling of it." [16] (Tr. 163). Dr. Milton testified that Complainant told her that he wanted an office so he would not have to eat his lunch in the "hall like an animal." In addition, Complainant expressed a concern that working in the lab for over forty hours per week could be hazardous because of the exposure to radioactivity. Dr. Milton explained to Complainant there was no such hazard because the radioactivity was stored and used properly, and there was no "ruling to say you can't stay in the lab" for extended periods of time. (Tr. 180, 182). Dr. Milton testified that she did not have "any problems" with Complainant's concerns with radiation safety in the lab. (Tr. 127-128).

Dr. Milton hired Complainant because the position was difficult to fill and Complainant could perform the work. [17] (Tr. 168). She explained that she was in a bind and decided that she could "put up with some things to get what [she] needed." (Tr. 169, ln. 17). In the end, Dr. Milton concluded that Complainant was not right for the job position because his behavior changed and he continued to make more demands and offer more complaints. (Tr. 169-170).

Sometime between July 9 and July 12, 1996, Complainant informed Dr. Milton that the fume hood was not properly venting. In addition, he again raised his concerns about the storage of the radioactive material in the lab. According to Dr. Milton, she and Complainant began to have more conversations regarding the storage of radioactive material. (Tr. 101-103). Dr. Milton later testified that she recalled having only one conversation concerning the storage of the radioactive material and the fume hood from July 9 until July 12, 1996. Dr. Milton testified she informed Complainant that the school engineering department determined the facilities in the lab were adequate for the work performed, including the use of radioactive material. Sometime between July 9 and July 12, 1996, Complainant used a Geiger counter to show Dr. Milton that the radioactivity in the lab could be measured. (Tr. 104). Dr. Milton explained to Complainant that he had to look at the amount of radioactivity measured and not rely only on the clicking sounds made by the Geiger counter. She attempted to read the amount of radioactivity measured by the Geiger counter, however, Complainant turned off the Geiger counter and put it away. (Tr. 104-105).

Dr. Milton testified that radioactive material was stored in the lab on the day

---

Complainant used the Geiger counter. The iodine-125 was under the hood, behind a lead shield. In addition, there was material in the refrigerator and the freezer. (Tr. 105). Dr. Milton testified that an outside agency performed monthly wipe tests which showed that the lab was in compliance with Respondent's license for the use and storage of radioactivity. (Tr. 133-135; RX-N). The wipe tests were performed from March 1996 through July 1996. (RX-N). In addition, Dr. Milton testified that Respondent's "radiation inspection report" showed that the lab was inspected and exhibited radiation levels less than 0.1 millirem per hour, which was in compliance with "safety." (Tr. 136-137). Similarly, Complainant's radiation exposure level was monitored from April 5, 1996 through July 4, 1996, and indicated a .005 REM level of total exposure. (RX-P). Dr. Milton testified that a 5.00 level is considered "caution" and Complainant was well under the cautionary level for radiation exposure. (Tr. 145-148). Lastly, the Texas Department of Health, Bureau of Radiation Control conducted a spot check of the lab on September 24, 1996 for proper radiation storage and usage. (Tr. 151; RX-I). Dr. Milton testified that until September 24, 1996, she was unaware that Complainant filed a complaint with the Texas Department of Health. (Tr. 156).

Dr. Milton testified that there has always been caution radioactive material stickers on the entrance door to the lab. She was unaware whether there was a caution sign on the refrigerator door as of July 1, 1996. The sign was placed on the refrigerator as the result of Complainant expressing his concerns with the radioactivity in the lab. (Tr. 214).

Dr. Milton testified that the research associate position no longer exists due to budgetary cuts beginning on September 1, 1996. (Tr. 159).

Barbara Hayes, **Ph.D.**

Dr. Barbara Hayes testified that she has been an associate professor of pharmacology since 1991 and the program director of the RCMI Program for Respondent's institution since 1991. [18] The RCMI grant is a three year grant running from August 1994 through August 1997. At the time of the hearing, renewal applications were submitted for the continuation of the grant. Dr. Hayes testified that at the time of the hearing, she did not intend to terminate the current employees working under the RCMI grant. (Tr. 450-451).

Dr. Hayes hired Complainant in March 1996 as a temporary research associate for the molecular biology lab (MBL) under RCMI grant funds. Because there was no director of the MBL in March 1996, Dr. Hayes was the selecting and appointing official for Complainant's appointment to the temporary position. Complainant began work on March 25, 1996. (Tr. 452-453; CX-2A).

In early April 1996, Dr. Hayes learned from the RCMI grant administrative assistant that Complainant had concerns about working in the lab because he did not have medical insurance. Dr. Hayes asked to speak with Complainant on the telephone at which time Complainant denied having or expressing these concerns. (Tr. 460). Although Complainant denied having these

---

concerns, Dr. Hayes felt compelled to address them and instructed Complainant not to work with radioactive material. (Tr. 461-462).

Dr. Milton was the selecting official for the research associate position advertised in April 1996 which had to be approved by Dr. Hayes. Dr. Hayes testified that on July 3, 1996, she approved Dr. Milton's selection of Complainant for the research associate job position. (See CX-7A [19]). In addition to approving Dr. Milton's selection of Complainant, Dr. Hayes signed a second personnel form on July 3, 1996, which ended his temporary appointment because he was transferred to another project as of July 1, 1996. [20] (Tr. 491; CX-6A). The form was signed by Dr. Lecca and a representative of the vice-president. (CX-6A). On July 19, 1996, Dr. Hayes completed a second personnel form because Complainant's temporary appointment was ending on July 31, 1996. (Tr. 496; CX-6B). At the time she completed the second document, she believed that

Complainant was going to be hired as Dr. Milton's research associate in a permanent status. (Tr. 497).

Dr. Hayes instructed Dr. Milton, presumptively on July 9, 1996 as testified by Dr. Milton, to place a hold on the appointment because Complainant informed Dr. Milton that he was unsure whether he wanted the job position. (Tr. 463). Dr. Hayes testified that it was her intention to document Complainant's reconsideration of the job position. (Tr. 464). Dr. Hayes testified that during this conversation, Dr. Milton informed her she was reconsidering the selection of Complainant for the job position. [21] (Tr. 464). Dr. Hayes testified Dr. Milton mentioned that Complainant repeatedly discussed the salary discrepancy issue and the office issue. Moreover, Dr. Milton stated that Complainant had difficulty following her instructions. (Tr. 487). Dr. Milton did not mention anything about Complainant's safety concerns. (Tr. 526). Although Dr. Milton informed Dr. Hayes that she was reconsidering her selection of Complainant, Dr. Hayes believed that Dr. Milton still wanted Complainant to work as her research associate. (Tr. 464).

Dr. Hayes testified that she did not speak with Complainant until July 22, 1996 at which time he related his safety concerns about the lab conditions. (Tr. 460, 464). He informed Dr. Hayes that the storage of radioactive material in the lab was not proper. He explained that the material was not properly labeled. (Tr. 471). In addition, Complainant discussed the air circulation in the fume hood. [22] (Tr. 546).

In addition, Complainant informed Dr. Hayes that Dr. Milton withdrew the employment offer. (Tr. 473). Complainant informed Dr. Hayes that he wanted the appointment to the permanent research associate job position. He indicated that he did not reconsider accepting the appointment at any time. (Tr. 465-466). As of July 22, 1996, Dr. Hayes had not been informed by Dr. Milton that she withdrew the job offer to Complainant, and Dr. Hayes believed that Dr. Milton wanted Complainant to work as her research associate. (Tr. 470). Dr. Hayes testified that Complainant threatened to file a complaint with the Texas Department of Health concerning the conditions in the lab if he was not given a job position. (Tr. 471-472).

In response to her conversation with Complainant regarding his safety concerns, Dr. Hayes began to informally investigate his safety concerns. Dr. Hayes obtained previous inspection reports for the lab. Furthermore, she requested Ms. Chen to investigate the storage of the isotopes and determine whether radioactive cautionary labels were placed on the storage areas and workbenches where radioactive material was used. [23] (Tr. 475). Dr. Hayes did not personally inspect the lab. (Tr. 481). According to Dr. Hayes, Ms. Chen reported that there were no cautionary signs on the refrigerator where radioisotopes were stored nor on the workbench. (Tr. 513). Cautionary signs were placed in these areas. (Tr. 514).

On July 29, 1996, Dr. Milton informed Dr. Hayes that she did not want Complainant to work for her as a research associate. (Tr. 483, 490). According to Dr. Hayes, Dr. Milton stated that she did not want Complainant as a research associate because he asked for things which she could not provide, such as an office. Dr. Hayes testified that Complainant was upset because the director for the MBL was going to occupy the office in which Complainant worked. In addition, Dr. Milton mentioned that Complainant continued to discuss the salary discrepancy although it had been corrected and he did not want to follow her instructions while conducting work in the lab. (Tr. 483-484).

During this same conversation, Dr. Milton and Dr. Hayes discussed Complainant's safety concerns. Dr. Milton informed Dr. Hayes that the iodine was properly stored under the fume hood and the hood was properly labeled. Dr. Milton had mentioned the Geiger counter incident. (Tr. 500).

Dr. Hayes testified that in her experience, all areas where experiments were conducted with radioactive material would be labeled with cautionary tape. (Tr. 556).

Dr. Hayes testified that the labs have waste containers where radioactive waste is disposed. The waste is then collected and separated into wet and dry waste. The waste is further separated in terms of activity. The project investigator is responsible for bringing the waste to the lead-lined room where it is stored until the containers become full. Once the containers are full, an outside agency removes the waste. (Tr. 574-576).

Arun L. Jadhav, **Ph.D.**

Dr. Arun Jadhav testified that he has been a professor of pharmacology and toxicology for Respondent since 1989. (Tr. 581). At an undetermined time, Complainant asked Dr. Jadhave for information concerning the proper use of iodine-125. He explained that it was a brief conversation in which they discussed "some general area of nature . . . about . . . how to use the radioactive material properly." (Tr. 592-593, ln. 24).

Barbara Evans

Barbara Evans testified that she has been the executive assistant to Dr. Pedro Lecco, the dean of the College of Pharmacy and Health Sciences for fifteen years. In May or June

---

1996, Complainant came to her to make an appointment with the dean. Complainant wanted to discuss office space in the College of Pharmacy and Health Sciences. [24] Ms. Evans testified that Complainant was nice during their conversation. (Tr. 610-611). According to Ms. Evans, Complainant explained that he wanted an office because he did not like being in the lab all the time and he wanted another place to go to perform work. (Tr. 613).

Vacancy Announcement

The vacancy announcement for the research associate job position in the College of Pharmaceutical Sciences indicated that the position was for forty hours per week, eight hours per day. The major duties and responsibilities included the following:

> Perform professional level biomedical research that requires independent action and decision making and includes planning as well as conducting experiments and radioactive assays, performing the iodination of insulin and other proteins and tissue culture duties. Construct, assemble, and operate lab equipment; graph and interpret data; prepare presentation materials. Assist in the development of new or improved techniques including procedures to isolate and maintain cells in culture. Plan, schedule, and coordinate detailed phases of one or more parts of a research project. Provide training and assistance to undergraduate students. Some ordering and lab maintenance duties included.

(CX-1). The proposed annual salary was $31,100.00 to $31,338.00. The minimum qualification for the job position was a masters of science degree in biomedical science. The advertisement indicated that a candidate with only a bachelor of science degree would be considered if they had considerable basic research experience. Tissue culture experience was preferred. (CX-1).

The Contentions of the Parties

Complainant contends that he engaged in protected activity under the employee protection provision of the ERA when he repeatedly voiced internal and external safety concerns about the conditions in the lab for the use of radioactive material.

Complainant further contends that he was subjected to adverse employment action when Respondent withdrew an offer of employment for a permanent job position which was motivated by his repeated complaints about the safety conditions in the lab.

Respondent contends that Complainant did not engage in protected activity under the employee protection provision of the ERA because he did not act in good faith when he verbally complained about the condition of the fume hood in the lab. Respondent argues that Complainant's safety complaints should have been submitted in writing to a government agency.

Respondent contends that it was unaware of the external complaints Complainant made to the Texas Department of Health, Radiation Department, which occurred after the offer of employment was withdrawn.

Respondent further contends that the offer of employment was withdrawn for legitimate, nondiscriminatory reasons.

Lastly, Complainant contends that he is entitled to damages encompassing back pay, lost benefits, compensatory damages, and reasonable costs and attorney fees.

III. DISCUSSION

Prefatory to a discussion of the issues presented for resolution, it must be noted that I have thoughtfully considered and evaluated the rationality and consistency of the testimony of all witnesses and the manner in which the testimony supports or detracts from the other record evidence. In doing so, I have taken into account all relevant, probative and available evidence and attempted to analyze and assess its cumulative impact on the record. See Frady v. Tennessee Valley Authority, Case No. 92-ERA-19 (Sec'y Oct. 23, 1995)(Slip Op. p. 4).

Credibility of witnesses is "that quality in a witness which renders his evidence worthy of belief." Indiana Metal Products v. NLRB, 442 F.2d 46, 51 (7th Cir. 1971). As the Court further observed:

> Evidence, to be worthy of credit, must not only proceed from a credible source, but must, in addition, be credible in itself, by which is meant that it shall be so natural, reasonable and probable in view of the transaction which it describes or to which it relates, as to make it easy to believe ...Credible testimony is that which meets the test of plausibility.

442 F.2d at 52. It is well-settled that an administrative law judge is not bound to believe or disbelieve the entirety of a witness' testimony, but may choose to believe only certain portions of the testimony. Altemose Construction Company v. NLRB, 514 F.2d 8, 16 and n. 5 (3d Cir. 1975).

Moreover, based on the unique advantage of having heard the testimony firsthand, I have observed the behavior, bearing, manner and appearance of witnesses from which impressions were garnered of the demeanor of those testifying which also forms part of the record evidence. In short, to the extent credibility determinations must be weighed for the resolution of issues, I have based my credibility findings on a review of the entire testimonial record and exhibits with due regard for the logic of probability and the demeanor of witnesses.

Generally, of the two primary witnesses in this matter, Complainant was an impressive witness in terms of confidence, forthrightness and overall bearing on the witness stand.

His testimony was straight-forward, detailed and presented in a sincere, consistent manner. On the other hand, Dr. Milton presented inconsistent and vague testimony as specifically discussed below.

A. Respondent's Alleged Discriminatory Actions

An employee must establish the following to show unlawful discrimination: (1) the employer is governed by the Act, (2) the employee engaged in protected activity as defined in the Act, and (3) as a result of engaging in such activity, the employee's terms and conditions of employment were adversely affected. 42 U.S.C. § 5851.

The Secretary of Labor has repeatedly articulated the legal framework within which parties litigate in retaliation cases. Under the burdens of persuasion and production in whistleblower proceedings, the complainant first must present a prima facie case. In order to establish a prima facie case, a complainant must show that: (1) the complainant engaged in protected activity; (2) the employer was aware of that conduct; and (3) the employer took some adverse action against the employee. Bechtel Construction Company v. Secretary of Labor, 50 F.3d 926, 933 (11th Cir. 1995). The complainant also must present evidence sufficient to raise the inference that the protected activity was the likely reason for the adverse action. Id. See also McCuistion v. TVA, Case No. 89-ERA-6 (Sec'y Nov. 13, 1991)(Slip op. at 5-6); MacKowiak v. University Nuclear Systems, Inc., 735 F.2d 1159, 1162 (6th Cir. 1983).

The respondent may rebut the complainant's prima facie showing by producing evidence that the adverse action was motivated by legitimate, nondiscriminatory reasons. Complainant may counter respondent's evidence by proving that the legitimate reason proffered by the respondent is a pretext. Yule v. Burns International Security Service, Case No. 93-ERA-12 (Sec'y May 24, 1994)(Slip op. at 7-8). In any event, the complainant bears the burden of proving by a preponderance of the evidence that he was retaliated against in violation of the law. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S.Ct. 2742 (1993); Dean Darty v. Zack Company of Chicago, Case No. 82-ERA-2 (Sec'y Apr. 25, 1983) (Slip op. at 5-9) (citing Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089 (1981)).

Since this case was fully tried on the merits, it is not necessary for the undersigned to determine whether Complainant presented a prima facie case. See Carroll v. Bechtel Power Corp., Case No. 91-ERA-46 (Sec'y Feb. 15, 1995)(Slip op. at 11, n.9), aff'd sub nom Bechtel Corp. v. U.S. Dep't of Labor, 78 F.3d 352 (8th Cir. 1996); James v. Ketchikan Pulp Co., Case No. 94-WPC-4 (Sec'y Mar. 15, 1996); Creekmore v. ABB Power Systems Energy Service, Inc., Case No. 93-ERA-24 (Dep. Sec'y Feb. 14, 1996). Once respondent has produced evidence that complainant was subjected to adverse action for a legitimate, nondiscriminatory reason, [25] it no longer serves any analytical purpose to answer the question whether Complainant presented a prima facie case.

Instead, the relevant inquiry is whether Complainant prevailed by a preponderance of the evidence on the ultimate question of liability. See Reynolds v. Northeast Nuclear Energy Co., Case No. 94-ERA-47 @ 2 (ARB Mar. 31, 1997); Boschuk v. J&L Testing, Inc., Case No. 96-ERA-16 @ 3, n.1 (ARB Sept. 23, 1997); Eiff v. Entergy Operations, Inc., Case No. 96-ERA-42 (ARB Oct. 3, 1997). If Complainant did not prevail by a

preponderance of the evidence, it matters not at all whether he presented a prima facie case.

The undersigned finds that as a matter of fact and law, Respondent has articulated a legitimate, nondiscriminatory reason for its actions. Zinn v. University of Missouri, Case No. 93-ERA-34 @ 4 (Sec'y, Jan. 18, 1996). Dr. Milton testified that she withdrew the offer of employment because Complainant would not unequivocally accept the job position as of July 12, 1996, ten days after she formally selected him for the job position. In addition, Dr. Milton testified that other factors such as Complainant's unwillingness to follow her instructions and his repeated harassment regarding the future loss of his office space contributed to her decision to withdraw her offer of employment. Thus, I find and conclude that Respondent met its burden of production to articulate a legitimate, nondiscriminatory basis for its adverse employment action.

Once Respondent has articulated a legitimate, nondiscriminatory reason for its withdrawal of the employment offer to Complainant, the burden shifts to him to demonstrate that Respondent's proffered motivation was not its true reason but is pre-textual and that its actions were actually based on discriminatory motive. Leveille v. New York Air National Guard, Case No. 94-TSC-3 and 94-TSC-4 @ 7-8 (Sec'y Dec. 11, 1995)(Slip op. at 7-8); Carroll, supra, @ 6; See Bechtel Construction Company, supra, at 934. Complainant may demonstrate that the reasons given were a pretext for discriminatory treatment by showing that discrimination was more likely the motivating factor or by showing that the proffered explanation is not worthy of credence. 42 U.S.C. § 5851(b)(3)(c); Zinn, supra @ 5; Yellow Freight Systems, Inc., 27 F.3d 1133, 1139 (6th Cir. 1994). Complainant retains the ultimate burden of proving, by a preponderance of the evidence, that the adverse action was in retaliation for the protected activity in which he was allegedly engaged in violation of the ERA. Id. (citing Texas Dep't of Community Affairs, supra. See also Creekmore, supra.

1. Respondent is governed by the Act.

As a licensee of the Commission, I find and conclude that Respondent is governed by the Act. [26] (See RX-I; CX-27). Although Respondent does not dispute Complainant's status as an employee, it should be noted that it is well established that the Act protects applicants for employment. Stultz v. Buckley Oil Co., Case No. 93-WPC-6 @3 (Sec'y June 28, 1995); Samodurov v. Niagara Mohawk Power Corp., Case No. 89-ERA-20 @ 4 (Sec'y Nov. 16, 1993); Cowan v. Bechtel Construction Inc., Case No. 87-ERA-29 slip op. at 2 (Sec'y Aug. 9, 1989). Complainant, Dr. Milton, and Dr. Hayes testified that he submitted an application to be considered for the permanent research associate job position. Thus, I find and conclude that Complainant was protected under the

---

Act's employee protection provision as a job applicant.

2. Complainant engaged in protected activity.

The second issue for discussion is whether Complainant was engaged in protected activity when Complainant made internal complaints to Respondent regarding the safety condition in the lab for the safe use of radioactive material. On October 9, 1992, Congress passed H.R. 776, the Comprehensive National Energy Policy Act which was signed into law on October 24, 1992. The Comprehensive National Energy Policy Act made several significant amendments to the whistleblower provision of the Energy Reorganization Act of 1974 including explicit coverage of internal complaints as protected activity.

I find that Complainant engaged in protected activity under the Act of which Respondent had knowledge before withdrawing the offer of employment to him. Complainant and Dr. Milton testified that he informed her sometime before she withdrew the offer of employment of the following conditions in the lab which made it unsafe for the use and handling of radioactive material: (1) inadequate flow in the fume hood; (2) the improper storage of radioactive material in the lab; (3) the need for cautionary signs to be placed in specific areas in the lab; and (4) the need to remove radioactive waste material from the lab. I further find that Complainant repeatedly informed Dr. Milton of his safety concerns regarding the condition of the lab. Complainant credibly testified that he repeatedly informed Dr. Milton of his safety concerns before July 12, 1996. In addition, Dr. Milton testified that Complainant informed her on more than one occasion of his safety concerns with the conditions in the lab.

An employee's informal complaints to an employer constitute protected activity. See Bechtel, supra, (A complainant verbally informed a supervisor that he believed the handling of contaminated tools violated safety requirements.) Respondent incorrectly argues that Complainant was required to place his safety concerns in written format or relate his concerns to a government agency. Based on the testimony of Complainant and Dr. Milton, I find and conclude that Complainant engaged in protected activity and Respondent had knowledge of his protected activity before Dr. Milton withdrew the offer of employment to Complainant.

A complainant is not required to prove an actual violation of the underlying statute. Yellow Freight System, Inc., supra, at 357; Crosier v. Westinghouse Hanford, Case No. 92-CAA-3 @ 4 (Sec'y Jan. 12, 1994). Instead, a complainant's complaint must be made in good faith and "grounded in conditions constituting reasonably perceived violations of the environmental acts." Crosier @ 4; Johnson v. Old Dominion Security, Case No. 86-CAA-3 (Sec'y May 29, 1991). I find that Complainant's internal complaints to Dr. Milton were reasonably perceived as violations under the Act based on his work experience and educational degrees. Complainant has a doctorate degree in biochemistry and has conducted experiments with radioactive material while he worked at UTMB and the University of London. In addition, Complainant testified, without contradiction, that he received training for the use of radioactive material and special training for the use of iodine-125. Thus, I find and conclude

that Complainant's complaints of safety concerns to Dr. Milton were made in good faith and were reasonable and rational in light of his academic credentials and work experience.

As noted above, the investigation conducted by the Texas Department of Health, Radiation Department, which indicated that Respondent was in compliance with pertinent regulations as of September 24, 1996, one and one-half months after its discriminatory action, does not preclude a finding of liability for adverse employment action in response to an employee's protected activity under the extant circumstances. Notwithstanding the proximity of time between Complainant's complaints of safety concerns and the compliance report, Complainant credibly testified, in contradiction to the report, that as of July 11, 1996, the day before his employment selection was withdrawn, the following conditions existed in the lab: (1) the waste remained in the lab; (2) all of the waste material was not stored in the fume hood behind the lead shield but underneath the fume hood in a cupboard and in the refrigerator; (3) he never saw the Policies and Procedures Pertaining to Radiation Safety Manual; and (4) there were no cautionary labels on the lab entrance doors, the refrigerator door, nor the workbenches where radioactive material was used. Furthermore, Dr. Hayes testified that she learned as of July 22, 1996, that the areas in the lab where radioactive experiments took place did not have cautionary signs.

Accordingly, I find and conclude that Complainant engaged in protected activity from May 1996 through July 11, 1996 when he reported his safety concerns to Dr. Milton regarding the alleged unsafe conditions in the lab for the use of radioactive material.

3. Adverse employment action.

Employer asserted that the offer of employment to Complainant was withdrawn because Complainant did not unequivocally accept the offer of employment and he lacked professionalism and demeanor toward Dr. Milton when he responded to the discrepancy over his salary and the loss of office space.

I find that Dr. Milton's testimony regarding her reconsideration of Complainant's appointment was incredulous, inconsistent and lacked the specificity to support her dissatisfaction with Complainant, absent his protected activity. Dr. Milton testified that she became concerned in early June 1996 about her selection of Complainant for the job position because he acted in an unprofessional manner and became enraged when he learned he would lose his office space upon accepting the position. Notwithstanding this alleged concern, Dr. Milton had the opportunity to forego formally selecting Complainant for the job position, yet on July 2, 1996, she formally selected him. [27] She later testified inconsistently that she was satisfied with his professionalism and demeanor until July 8, 1996. Furthermore, Complainant's concern of losing his office space and working in the lab forty hours per week was directly related to his expressed safety concerns over the "unsafe lab." Finally, Dr. Milton did not document these concerns in her memorandum

placing Complainant's appointment on hold on July 9, 1996, although she testified that he repeatedly brought up the office issue in an unprofessional manner.

[Page 21]

Dr. Milton testified that she was concerned with Complainant's demeanor because of his reaction to the salary discrepancy on July 8, 1996. However, Dr. Milton did not terminate discussions with Complainant once she learned that she did not have the authority to offer the higher salary, but rather she persuaded Dr. Hayes to authorize the higher salary for Complainant. Moreover, it should be noted that Dr. Milton did not inform Dr. Hayes until July 29, 1996, that she did not want Complainant to work as her research assistant.

I find that Complainant credibly denied expressing reservation about accepting the job position which is amply supported by the record. Complainant is married with three children and obtained employment with Employer after seven months of unemployment. In addition, the record indicates that Complainant had been continuously employed for the past seven years and only left his previous job position because his supervisor retired causing the grant to end. Complainant credibly testified that he was very upset upon losing the job position. Moreover, Mrs. Agbe credibly testified that he was devastated upon losing the job position and concerned about the well-being of their family. Thus, I find it improbable that Complainant would have expressed reservation about accepting the permanent job position.

As of July 9, 1996, Dr. Milton had not informed Dr. Hayes that she did not want Complainant to work as her research associate. Although Dr. Milton expressed concerns about Complainant to Dr. Hayes, Dr. Hayes testified that she believed Dr. Milton wanted Complainant to work as her research associate despite the concerns mentioned above.

Dr. Milton testified that Complainant was unwilling to follow her instructions although he would eventually complete the work as instructed. Dr. Milton did not provide any specific examples demonstrating such unwillingness. Furthermore, Dr. Milton did not document this concern in her memorandum placing Complainant's appointment on hold. It should be noted that although Dr. Milton did not specify the time period in which Complainant refused to follow her instructions, such concern, if it arose prior to July 2, 1996, did not dissuade her selection of Complainant for the job position.

Consequently, I find and conclude that Dr. Milton's concerns as discussed above, are not supported by record evidence and her actions are clearly motivated by Complainant's repeated safety complaints of the conditions in the lab. Respondent has not met its burden to show that Complainant's internal safety complaints did not motivate Dr. Milton to withdraw the offer of employment to Complainant.

Finally, I find that Dr. Milton withdrew the employment offer to Complainant because he repeatedly requested her to remedy the alleged unsafe conditions in the lab. On July

11, 1996, Complainant discussed with Dr. Milton the alleged unsafe lab conditions and her inattentiveness to his repeated requests to remedy the conditions. Moreover, Complainant attempted to show Dr. Milton that the presence of radioactivity was measurable by Geiger counter and unsafe for anyone using the lab. Furthermore, Complainant informed Dr. Milton that he had contacted the Texas Department of Health, Radiation Department, concerning her lab. The following day, July 12, 1996, Dr. Milton withdrew the offer of employment to Complainant. As a matter of law,

---

proximity in time between the protected activity and the adverse employment action is solid evidence of causation sufficient to justify an inference of retaliatory motive. Bechtel, supra, at 934; Couty v. U.S. Dept. of Labor, Sec'y Dole, 886 F.2d 147, 148 (8th Cir. 1989)(Complainant was discharged approximately thirty days after he engaged in protected activity.); White v. The Osage Tribal Council, Case No. 95-SDW-1 @ 4 (ARB Aug. 8, 1997). To the extent Dr. Milton was reconsidering her selection of Complainant, I find and conclude that her decision to withdraw the offer of employment to Complainant was tainted by her concern for his insistence that his safety concerns be addressed.

In addition, Complainant testified that Dr. Milton informed him she could not work with him because Complainant was causing her problems with his repeated safety concerns. Dr. Milton testified, but without elaboration, that she informed Complainant, on July 12, 1996, she could not work with him if they were going to experience "these kind of issues." Dr. Milton did not inform Complainant that she was withdrawing the employment offer because he acted unprofessional, failed to follow her instructions, or that his demeanor changed such that she could not work with him. I find that Dr. Milton's shifting reasons for the withdrawal of the employment offer to Complainant indicate that the more probable reason Dr. Milton withdrew the employment offer to Complainant was retaliation for his protected activity. See James, supra @ 4; Hobby v. Georgia Power Co., Case No. 90-ERA-30 (Sec'y Aug. 4, 1995). Accordingly, I further find and conclude that Respondent failed to establish a legitimate and non-discriminatory reason for its employment action against Complainant.

Based on Dr. Milton's inconsistent and vacillating testimony concerning her satisfaction with Complainant's job performance, professionalism, and demeanor, her shifting reasons, albeit vague and unsupported, for withdrawing the employment offer to Complainant, and the proximity of time between Complainant's protected activity and Respondent's adverse employment action, I find and conclude that the adverse employment action was in retaliation for Complainant's protected activity.

4. Conclusion

In conclusion, I find that Complainant has sustained his burden of persuasion by a preponderance of evidence that Respondent is governed by the Act as a licensee,

Complainant was an employee protected under the Act engaged in protected activity for which Respondent had knowledge, and Respondent's withdrawal of the employment offer to him was in retaliation for Complainant's protected activity. Accordingly, I find and conclude that Complainant is entitled to relief under the Act because adverse employment action was taken by Respondent in retaliation for his protected activity.

B. Damages & Remedy

A successful ERA complainant is entitled to affirmative action to abate the violation, reinstatement to his former job position, back pay, costs, and attorney fees. 42 U.S.C. § 5851(b)(2)(B). In addition, the Secretary may award compensatory damages. Id.

[Page 23]

1. Reinstatement and Back pay

Although Complainant does not specifically argue in brief that he should be reinstated to his former position as a permanent research associate, reinstatement is an appropriate, statutory remedy under the circumstances. In the absence of a strong reason for not returning to his former position, reinstatement should be ordered. Dutile v. Tighe Trucking, Inc., Case No. 93-STA-31 (Sec'y Oct. 31, 1994); West v. Systems Applications International, Case No. 94-CAA-15 (Sec'y Apr. 19, 1995). However, Dr. Milton testified that the former position has been abolished for budgetary reasons. If Complainant's former position no longer exists, Respondent shall unconditionally offer him reinstatement to a substantially equivalent position in terms of duties, functions, responsibilities, working conditions, and benefits. Respondent's back pay liability terminates upon the tendering of a bona fide offer of reinstatement, even if Complainant rejects the offer. See Dutile, supra; Blackburn v. Metric Constructors Inc., Case No. 86-ERA-4 (Sec'y Oct. 30, 1991) aff'd in relevant part and rev'd on other grounds, Blackburn v. Martin, 982 F.2d 125 (4th Cir. 1992). Complainant is entitled to back pay from the date of termination until reinstated to employment. Creekmore, supra; Sprague v. American Nuclear Resources, Inc., Case No. 92-ERA-37 (Sec'y Dec. 1, 1994). In addition, Complainant is entitled to interest on the back pay amount at the rate specified for underpayment of federal income tax at 26 U.S.C. § 6621. Creekmore, supra @ 10; Blackburn, supra. The purpose of back pay is to make the employee whole and restore him to the position that he would have occupied in the absence of the unlawful discrimination. Doyle v. Hydro Nuclear Services, Case No. 89-ERA-22 (ARB Sept. 6, 1996). The employee discriminated against should only recover damages for the period of time he would have worked in the absence of the unlawful discrimination. Id. @ 2.

I find that Complainant is entitled to back pay and interest from July 1, 1996 to the present based on the research associate annual salary of $31,338.00. Dr. Hayes approved Complainant's appointment to the research associate job position as of July 3, 1996 to be retroactive to July 1, 1996. Thus, I find that Complainant would have received the permanent research associate salary as of July 1, 1996 absent Respondent's adverse

employment action. Accordingly, I find and conclude that Complainant is entitled to back pay from July 1, 1996 through the present. Respondent shall receive credit for the wages paid to Complainant as a temporary research associate through July 1996 and any interim earnings earned thereafter.

Although the RCMI grant reached its three year term in August 1997, Dr. Hayes sought its renewal and continued the employment of research associates thereafter. Therefore, in the absence of evidence that the RCMI grant was not renewed, I find Respondent's liability for back pay to Complainant extended beyond August 1997 to the present or the date of termination (non-renewal) of the RCMI grant.

Along with back pay, Complainant may recover health, pension, and other related benefits which are conditions and privileges of employment. Creekmore, supra. Such compensable damages include medical expenses incurred because of the loss

---

of medical benefits, including premiums for family medical coverage. Id. Complainant testified that he expended $189.00 per month toward his retirement plan or $2,268.00 per year which he would have saved absent the Respondent's discrimination, and $920.00 per year to maintain a life insurance plan. Mrs. Agbe's uncontradicted testimony showed that they paid $7,200.00 for medical insurance until Complainant obtained his current job position. In addition, Mrs. Agbe testified that they incurred $600.00 worth of medical expenses. Based on Complainant's and Mrs. Agbe's uncontradicted testimony, I find and conclude that Complainant is entitled to reimbursement for the above listed benefits totaling $10,388.00.

Respondent has the burden of establishing that the back pay award should be reduced because Complainant did not exercise diligence in seeking and obtaining other employment. West, supra @7. Evidence that Complainant failed to mitigate his damages would reduce the amount of back pay owed, however, Respondent failed to put forth evidence showing that Complainant failed to mitigate his damages. In addition, Complainant credibly testified that he actively sought employment from July 31, 1996 through August 13, 1996. As of June 1997, Complainant enrolled in a certification course to become certified to teach at the high school level and broaden his employment opportunities. Thus, I find and conclude that Complainant exercised diligence in seeking and obtaining other employment.

Complainant earned a total of $978.00 from August 1, 1996 through August 13, 1997 while teaching evening courses. Deductible interim earnings are earnings that a complainant could not have earned if he had not suffered unlawful discrimination. Marcus v. U.S. Environmental Protection Agency, Case No. 92-TSC-5 (Sec'y Sept. 27, 1994). I find that it cannot be determined from the record evidence whether these earnings are interim earnings or collateral earnings which Complainant could have earned while working for Respondent as a research associate. Although Complainant's and Mrs.

Agbe's uncontradicted testimony indicates that he taught these courses in the evenings, presumably after regular work hours, Complainant's regularly scheduled hours as a research associate are unknown. Based on the lack of evidence, I cannot determine whether these earnings would have been supplemental. Any uncertainties in establishing the amount of back pay are resolved against the discriminating party. Creekmore, supra @ 8. Thus, I find and conclude that these earnings shall not be deducted from the award of back pay.

Complainant received $5,800.00 in unemployment compensation. As a matter of law, this amount will not be deducted from Complainant's award. Keene Ebasco Constructors, Inc., Case No. 95-ERA-4 @ 9 (ARB Feb. 19, 1997); Artrip v. Ebasco Services, Inc., Case No. 89-ERA-23, @ 5 (ARB Sept. 27, 1996).

2. Compensatory damages

Complainant is entitled to compensatory damages under the Act. To recover compensatory damages, complainant must show that he experienced mental and emotional distress caused by Respondent's adverse employment action. Creekmore, supra, @ 12. An award may be supported by the circumstances of the case and testimony about physical or mental

---

consequences of the retaliatory action to include emotional pain and suffering, mental anguish, embarrassment and humiliation. Id.; Lederhaus v. Paschen, Case No. 91-ERA-13 (Sec'y Oct. 26, 1992). Complainant testified that he was upset when Dr. Milton informed him of the withdrawal of the offer of employment. In addition, Mrs. Agbe testified that Complainant was devastated when he learned he would not be appointed to the research associate position. She explained that Complainant was concerned for the well-being of their family. This evidence is unrefuted, credible, and is hereby accepted. In light of the demonstrated fear of losing employment following an extended period of unemployment from UTMB and the emotional stress and humiliation related to it such as concern for the welfare of his family, I find and conclude that Complainant is entitled to an award of $10,000.00 as compensatory damages. Gaballa v. The Atlantic Group, Case No. 94-ERA-9 (Sec'y Jan. 18, 1996).

3. Attorney fees, costs, expenses

Lastly, Complainant is entitled to reasonable costs, expenses, and attorney fees incurred in connection with his complaint. 42 U.S.C. § 5851(b)(2)(B). Complainant did not submit an itemization of costs and expenses incurred in connection with his complaint. Moreover, Complainant's attorney did not submit a fee petition detailing the work performed, the time spent on such work, and the hourly rate of those performing the work.

The Rules of Practice and Procedure before the Administrative Law Judge allow the administrative law judge to make part of the record any motion for attorney fees authorized by statute, any supporting documentation, and any determinations thereon. 29 C.F.R. § 18.54(c). Accordingly, the record will be reopened for the limited purpose of permitting Complainant to make application for his costs and expenses and to permit Respondent an opportunity to respond thereto.

RECOMMENDED ORDER

IT IS HEREBY ORDERED THAT:

(1) Respondent reinstate Complainant to his former permanent research associate position or, if no longer available, to a substantially equivalent position with back pay from July 1, 1996 until his reinstatement and provide him with such other benefits as he would have been entitled to had he not been discriminated against. Employer shall receive credit for all compensation and wages heretofore paid, with the exception of his earnings from evening teaching and unemployment compensation, as and when paid.

(2) Respondent shall pay interest on the back pay at the rate specified in 26 U.S.C. § 6621 through the date of compliance with this order.

(3) Respondent shall reimburse Complainant for the costs he incurred for health insurance, medical costs, life insurance, and his retirement fund.

[Page 26]

(4) Respondent shall expunge from Complainant's personnel records all derogatory or negative information relating to his employment with Respondent. Respondent shall provide neutral employment references for Complainant and shall not divulge any information pertaining to not continuing Complainant's employment.

(5) Respondent shall pay Complainant $10,000.00 in compensatory damages.

(6) Complainant is granted twenty (20) days from receipt of this Recommended Decision and Order in which to file and serve a fully supported application for costs and expenses including attorney fees. Thereafter, Respondent shall have ten (10) days from receipt of the application in which to file a response.

(7) Respondent shall post the attached Recommended Notice to Employees (Appendix 1) on all bulletin boards of the Texas Southern University campus, and laboratory 201, where Respondent's official documents are posted, for sixty days ensuring that it is not altered, defaced or covered by other material.

ORDERED this 23rd day of January 1998, at Metairie, Louisiana.

LEE J. ROMERO, JR.
Administrative Law Judge

NOTICE

This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Secretary of Labor to the Administrative Review Board, U. S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N. W., Washington, D. C. 20210. The Administrative Review Board has the responsibility to advise and assist the Secretary in the preparation and issuance of final decisions in employee protection cases adjudicated under the regulations at 29 C.F.R. Parts 24 and 1978. See 61 Fed. Reg. 19978 and 19982 (1996).

RECOMMENDED NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
ADMINISTRATIVE REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR
AN AGENCY OF THE UNITED STATES GOVERNMENT

After a hearing in which all participants had the opportunity to present evidence, the Administrative Review Board, U.S. Department of Labor, has found that Texas Southern University (Respondent) violated the law, and has ordered the posting of this notice.

The Employee Protection Provision of the Energy Reorganization Act of 1974 (ERA), as amended, 42 U.S.C. § 5851 (1992), prohibits an Employer from discharging or otherwise discriminating against any employee with respect to his/her compensation, terms, conditions, or privileges of employment because the employee:

(A) notified his employer of an alleged violation of the ERA;
(B) refused to engage in any practice made unlawful by the ERA, if the employee has identified the alleged illegality to the employer;
(C) testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of the ERA;
(D) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under the ERA, or a proceeding for the administration or enforcement of any requirement imposed under the ERA;
(E) testified or is about to testify in any such proceeding, or;
(F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of the ERA.

WE WILL NOT discharge or otherwise discriminate against employees because they engage in protected activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights under the Employee Protection Provision of the ERA as enumerated above.

WE WILL unconditionally offer Dr. Samuel A. Agbe immediate and full reinstatement to his former job as a permanent research associate, or if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges.

WE WILL make Dr. Samuel A. Agbe whole for any loss of earnings, benefits or other forms of compensation he may have lost, plus interest thereon, because we discriminated against him.

WE WILL pay Dr. Samuel A. Agbe $10,000.00 in compensatory damages because of the mental or emotional distress imposed upon him as a result of our discriminatory, adverse employment action.

WE WILL expunge from our records all derogatory or negative information relating to Dr. Samuel A. Agbe.

WE WILL reimburse Dr. Samuel A. Agbe for costs and expenses, including attorney's fees, incurred in the prosecution of his complaint against Texas Southern University.

Texas Southern University
Respondent

Dated:_____ By: _____
(Representative) (Title)

(APPENDIX 1)

[ENDNOTES]

[1] References to the record are as follows: Transcript: Tr.___; Complainant's Exhibits: CX-___; Respondent's Exhibits: RX-___; and Administrative Law Judge Exhibits: ALJX-__.

[2] Iodine-125 is a volatile, x-ray emitting radionuclide. (Tr. 345).

[3] Some time in early July, Mr. Spivey attempted to contact Complainant on one occasion, however, Complainant was not on campus at this time. (Tr. 343).

[4] Complainant explained that he was concerned about using the iodine-125 because Respondent did not offer special training for the use of this material. He further explained that when he worked at UTMB, special training was required for the use of iodine-125, in

addition to the regular training for the use of radioactive material. (Tr. 257). Complainant testified that he never received the iodine-125. (Tr. 245).

[5] Sometime before Complainant was formally selected for the job position, Complainant contacted the Texas Department of Health, Bureau of Radiation Safety and the Occupational, Safety and Hazard Administration to obtain instructional help concerning the use of iodine-125. (Tr. 257-261, 290; CX-13). Complainant did not give his name when he contacted the Texas Department of Health because he did not want his complaint forwarded to Respondent. (Tr. 259-260).

[6] Mrs. Agbe explained that she managed their financial affairs. (Tr. 426).

[7] Mrs. Agbe testified that Complainant contributed to the Teacher's Retirement program as a part-time employee at Brazosport College. (Tr. 439).

[8] Mrs. Agbe explained that although she was working full-time, they did not have medical insurance when he began working for Respondent because she was not eligible to receive benefits for a few months. (Tr. 433).

[9] She explained that radioactive material was not used in the lab since sometime before December 1995. (Tr. 34, 41).

[10] Complainant had worked for her for one month prior to her asking him to apply for the position of research associate. (Tr. 167).

[11] Dr. Milton explained that the start date was changed to begin on the following payroll period since she selected Complainant after the original start date. Beginning on the new start date, Complainant's position of temporary research assistant would convert to permanent research assistant. (Tr. 71).

[12] Dr. Milton testified that Complainant chose not to attend the orientation because he learned that the salary for the job position was lower than the salary quoted to him by her. (Tr. 90).

[13] Dr. Milton testified that she informed Dr. Hayes on this same day about the other concerns she had with Complainant but that they could work through them. (Tr. 168-169).

[14] Complainant testified that he wanted an office so that he would not work forty hours in the lab where he believed unsafe conditions existed for the use and storage of radioactive material. (Tr. 354).

[15] Dr. Milton did not provide specific examples of instructions which Complainant failed but eventually completed.

[16] Dr. Milton testified that once Complainant was offered the permanent job position, he spoke with her supervisors voicing his concerns about maintaining his current office. (Tr. 195)

[17] Within the group of nine candidates, two held doctorate degrees. (Tr. 203; CX-8). She testified that the non-doctorate candidates did not have a vast amount of experience. (Tr. 206).

[18] The record does not contain evidence of Dr. Hayes' educational credentials.

[19] It should be noted that the job position appointment form was signed by Dr. Pedro Lecca and a representative of the vice- president. These signatures are not dated. (CX-7A).

[20] Dr. Hayes testified that this document was completed for accounting purposes to delete Complainant from an account. (Tr. 532). Complainant testified that he believed his permanent employment as a research associate for Dr. Milton was retroactive to July 1, 1996. (Tr. 363).

[21] Complainant did not inform Dr. Hayes that he was reconsidering whether he would accept the job position. (Tr. 465).

[22] Dr. Hayes testified that the hoods are periodically inspected to certify that they are functional. She did not indicate when the inspections occurred. (Tr. 547). She explained that it could be determined by anyone using the hood whether it was functioning properly. Lei Chen, Dr. Milton's research assistant for two years, never complained that the fume hood in the lab was not working properly. (Tr. 548). However, Ms. Chen's primary work area was not in the lab where Complainant worked. (Tr. 553).

[23] Contrary to her testimony, Dr. Hayes indicated in her answer to Complainant's interrogatories that no action was taken in response to the safety concerns Complainant related to her. (CX-21).

[24] Ms. Evans testified that research associates are provided office space when available. (Tr. 616).

[25] Upon articulating some legitimate, nondiscriminatory reason for the adverse employment action or "explaining what it has done," Respondent satisfies its burden, which is only a burden of production, not persuasion. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253, 256-257; 101 S.Ct. 1089, 1093, 1095-1096 (1981). The respondent must clearly set forth, through the introduction of admissible evidence, the reasons for the adverse employment action. The explanation provided must be legally sufficient to justify a judgment for the defendant. Id. at 255, 1094. Respondent does not carry the burden of persuading the court that it had convincing, objective reasons for the adverse employment action. Id. at 257, 1095.

[26] Respondent was issued Radioactive Material License Number L03121. (RX-I).

[27] Although Dr. Milton testified that she was pressed to fill the job position, there is no evidence that she immediately attempted to select an alternate candidate for the job position after she withdrew the employment offer to Complainant in furtherance of her work.